

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WESLEY DEVON FOOTE,)
)
)
Petitioner,)
)
)
v.) 1:11CV42
) 1:06CR177-1
UNITED STATES OF AMERICA,)
)
)
Respondent.)

ORDER

On September 24, 2013, the United States Magistrate Judge's Recommendation was filed and notice was served on the parties pursuant to 28 U.S.C. § 636. Petitioner filed objections [Doc. #88] to the Recommendation within the time limit prescribed by Section 636. The Court has reviewed Petitioner's objections *de novo* and finds they do not change the substance of the United States Magistrate Judge's Recommendation [Doc. #86], which is affirmed and adopted.

IT IS THEREFORE ORDERED that Petitioner's Motion [Doc. #48] and Amended Motion [Doc. #70] to vacate, set aside or correct sentence are DENIED, and this action is DISMISSED.

IT IS FURTHER ORDERED that a certificate of appealability is issued on the question of whether Petitioner, who was sentenced as a career offender under U.S. Sentencing Guideline § 4B1.1, but who in fact was not a career offender in

light of Simmons v. United States, can assert a cognizable claim under 28 U.S.C. § 2255, seeking to challenge a sentence that was below the statutory maximum that would still apply.

This the 7th day of November, 2013.

/s/ N. Carlton Tilley, Jr.
Senior United States District Judge